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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. A-856

UNITED ARTISTS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED ARTISTS CORPORATION,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner United Artists Corporation ("United Artists") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 20, 1979.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 20, 1979. A timely petition for rehearing or rehearing in banc was denied on April 25, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether an order denying an application under an antitrust consent decree in a civil case is a final appealable order within the meaning of 28 U.S.C. §1291, even though ancillary relief was sought to vacate a grand jury subpoena for misuse of government powers.

Statute Involved

This case involves the interpretation of 28 U.S.C. §1291.

Statement of the Case

United Artists is engaged in the financing and distribution of motion pictures, and is party to a consent decree dated February 8, 1950 in the civil antitrust action entitled *United States* v. *Loew's Incorporated, et al.* (S.D.N.Y. Equity No. 87-273) (hereinafter, this consent decree is referred to as the "*Paramount* decree" and the case as the "*Paramount* case").

The salient facts (viewed in the light most favorable to petitioner, as they must be in view of the summary disposition below) can be briefly stated:

Over a 21-month period commencing in March of 1977, the Antitrust Division of the Department of Justice (the "Government") requested, and obtained, from United Artists a large number of documents as well as interviews with United Artists' personnel, pursuant to a so-called "visitation" provision in the *Paramount* decree.* (The documents and interviews all relate to United Artists' distribution of one motion picture, "A Bridge Too Far"). Apparently, the Government's actions were in furtherance of an established policy of using civil remedies in aid of grand jury investigations, without disclosing such fact to United Artists.

At no time during the 21 months did the Government attorneys ever inform United Artists of any grand jury proceeding. No warnings were given to United Artists or those who were interviewed, and they were given no opportunity to assert their constitutional privileges. United Artists complied fully with the Government's requests for documents and witness interviews, as it always had during the preceding 29 years. United Artists never suspected (and had no reason to suspect) that the Government intended to take the information it obtained under the decree and turn that information over to a grand jury.

On December 20, 1978, the Government served United Artists with a subpoena *duces tecum* to produce the same documents and others before a criminal grand jury investigating the very same complaint raised in the civil pro-

* The basic facts, which are uncontested, are set forth at pp. 2-10, 61-64 in the Joint Appendix filed in the Circuit Court.

ceeding. The Government has admitted that it is using the grand jury to pursue charges of contempt, relief for which is equally available to the Government in the *Paramount* case under the punishment and compliance provisions of the decree and under Rule 42 of the Federal Rules of Criminal Procedure.

United Artists forthwith commenced a separate proceeding in the *Paramount* civil case before the District Court for the Southern District of New York to compel the Government to proceed, if at all, upon notice to United Artists, within the *Paramount* decree itself and pursuant to Fed. R. Crim. P. 42, and, *ancillary thereto,* also moved to quash the grand jury subpoena for misuse of powers.

The District Court (Palmieri, J.) dismissed United Artists' proceeding on February 15, 1979, without any evidentiary hearing and without permitting any discovery. The District Court also refused to vacate the grand jury subpoena. The District Court issued its order without writing an opinion.

On March 20, 1979, the Circuit Court dismissed United Artists' appeal on the ground that "Judge Palmieri's order was not a 'final decision' within the meaning of 28 U.S.C. §1291" (a copy of this decision is reproduced in the appendix).

The Circuit Court's misapprehension of the appealability of the District Court decision (see "Reasons for Granting the Writ," *infra*) prevented *any* judicial review of a number of novel and significant questions properly raised by petitioner:

1. Whether grand jury proceedings may be used in aid of a civil investigation under a consent decree. Petitioner believes that such a practice was condemned by this Court in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), and that the District Court overlooked the existence of such a practice in this matter.

2. Whether the Government may use its civil visitation remedies under a consent decree in aid of a grand jury investigation. Petitioner urges that this practice, which the Government has admitted to have occurred here, constitutes a misuse of power and a denial of fundamental fairness which has abrogated petitioner's constitutional rights, including the Fifth Amendment rights of petitioner's personnel.

3. *An issue as to which there is a conflict of authority between circuit courts,* namely, whether Rule 42 of the Federal Rules of Criminal Procedure is the exclusive statutory remedy for criminal contempts. (Compare *In re Amalgamated Meat Cutters & Butcher Workmen,* 402 F.Supp. 725 (E.D. Wis. 1975) (Rule 42 exclusive) with *United States* v. *Steinert,* 543 F.2d 69 (9th Cir. 1976) (Rule 42 non-exclusive)). Petitioner urges that Rule 42 should be held to be an exclusive remedy.

4. Whether, even if Rule 42 is non-exclusive, the Government may only proceed for criminal contempt by Rule 42 in this case in light of the severe prejudice suffered by petitioner from disclosing documents and testimony to the Government over nearly a two-year period during which there was no warning that a grand jury would be convened and in

reliance upon the fact that no grand jury had ever been used in the 29-year history of the *Paramount* decree to which United Artists is a party. *See United States* v. *Morales,* 566 F.2d 402 (2d Cir. 1977). The conduct of the Government herein in depriving United Artists of its constitutional protection is incompatible with the "rudimentary demands of justice". *Giglio* v. *United States,* 405 U.S. 150, 153 (1972).

5. Whether the Government, having sought to punish criminal contempts by application to a court rather than a grand jury for the past 100 years, has violated the dictate of 18 U.S.C. §402 that criminal contempts be punished "in conformity to the prevailing usages at law" by convening a grand jury rather than proceeding by Rule 42. Petitioner believes that any reviewing court will answer this question, which appears to be a question of first impression, in the affirmative.

6. Whether petitioner is entitled to discovery of the Government's intent in order to prove the misuse of Government powers in grand jury proceedings. Petitioner believes that the District Court incorrectly averted its eyes from any evidence of the Government's improper conduct and refused United Artists an opportunity to take discovery to prove the existence of such improper conduct, in contravention of the authority of the *Procter & Gamble* case (*supra*) (on remand from this Court, 187 F.Supp. 55, 59 *et seq.* (D.N.J. 1970)).

As discussed more fully below, petitioner believes that the District Court's decision was "final" within the meaning of 28 U.S.C. §1291, thereby making this matter appeal-

able so that these questions can be answered now. These questions involve fundamental rights of United Artists which will be irretrievably lost if the grand jury is allowed to proceed before they are answered. In addition, these questions should be answered before the expenditure of large quantities of time, effort and expense are wasted on any grand jury proceeding. If they are not answered until after the conclusion of the grand jury proceeding and any proceedings flowing therefrom, and if then even one of them is answered in petitioner's favor, the entire process will have been for nought.

Reasons for Granting the Writ

1. The decision of the Circuit Court conflicts with this Court's well-established rulings on appealability, particularly the appealability of dismissals of applications under consent decrees.

The Circuit Court's decision misapprehended the controlling authorities of this Court which hold that a post-judgment application pursuant to a consent decree in a civil case is a final appealable order within the meaning of 28 U.S.C. §1291, even though ancillary relief was sought to vacate a grand jury subpoena for misuse of government powers.

Under the final *Paramount* decree, any party has the right "to apply to the court at any time for such orders and directions" as may be necessary for the enforcement of its provisions. Pursuant to this clause, United Artists commenced a separate action in the *Paramount* case against

the Government by seeking an order compelling the Government to conduct all proceedings, including any contempt charges, within the *Paramount* case and pursuant to the provisions of the decree.* The action was dismissed by the District Court with costs to the Government.

An application for relief under the *Paramount* decree represents a separate independent proceeding in the same manner as if a summons and complaint had been filed, and a disposition thereof by the court is deemed to be a *final* determination within the meaning of 28 U.S.C. §1291.**

In *Shenandoah Broadcasting* v. *ASCAP*, 375 U.S. 39 (1963), the petitioner moved under a consent decree in a Government antitrust suit to compel ASCAP to grant it a license. This Court agreed that an order determining an application under a consent decree was appealable under §1291, holding that such an order was "final" and not "interlocutory," and that an appeal from such an order lay as a matter of right under the statute. 375 U.S. at pp. 40-1.

The fact that United Artists also challenged the propriety of the issuance of the grand jury subpoena served by the Government in violation of the protective provisions of the *Paramount* decree and under circumstances representing a clear misuse of the grand jury powers does not render an otherwise final order, non-appealable within the meaning of §1291.

* Ancillary to this proceeding United Artists also asked the court to quash the grand jury subpoena *duces tecum*.

** This was recognized by the Government when it sought costs in its favor, and by the District Court when it awarded such costs in its order. Under Rule 54 of the Federal Rules of Civil Procedure, costs are awarded to the prevailing party upon the entry of the *final* order, and not before.

The relief sought against the subpoena was ancillary to the main action, and was necessitated by the Government's improper use of grand jury proceedings immediately preceding its commencement. The instant action was brought to require the Government to conduct all proceedings, including any contempt charge, within the *Paramount* case and pursuant to the provisions of the decree which the Government itself had invoked in the first instance to obtain documents and interviews of witnesses.

Had the Government made known its intent to use grand jury proceedings before it sought discovery under the "visitation" powers of the *Paramount* decree, United Artists would have been able to test the propriety of such a procedure in the civil action before any grand jury subpoena was served 21 months later. Such a disclosure in advance would have made unnecessary any ancillary relief addressed to a subpoena. The failure of the Government to act properly in the premises should not determine the appealability of the instant order.

Moreover, the Circuit Court overlooked this Court's exceptions to the general rule that a denial of a motion to quash a grand jury subpoena is not appealable. In *Alexander* v. *United States*, 201 U.S. 117 (1906), it was held that an order in a *civil* action directing a witness to appear and produce documents before a special examiner designated by the court to hear testimony in a *civil* suit brought by the United States under the antitrust laws was not an appealable order. In *Cobbledick* v. *United States*, 309 U.S. 323 (1940), misapplied by the Circuit Court herein, it was held that the denial of an application made in a *criminal* pro-

ceeding to quash a *criminal* grand jury subpoena was equally not appealable.

Neither decision applies here. In the instant case, petitioner moved in a *civil* proceeding to quash a *criminal* subpoena, and therefore this represents an entirely independent action separate and apart from the criminal proceeding in terms of finality and appealability. This distinction was formulated by this Court in *Perlman* v. *United States,* 247 U.S. 7 (1918), and was later confirmed in *Cobbledick (supra),* 309 U.S. at 328-9:

> "This analysis of finality is illustrated by *Perlman* v. *United States,* 247 US 7. There, exhibits owned by Perlman and impounded in court during a patent suit were, on motion of the United States attorney, directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. This petition was denied and Perlman sought review here. The United States claimed that the action of the district court was 'not final' but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman 'powerless to avert the mischief of the order . . .' 247 US at 13. Perlman's exhibits were already in the court's possession. *If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use.* To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim" (Emphasis added).

The facts in *Perlman* are strikingly similar to the facts at bar. There, as here, documents were delivered to a third person under the protection of an order of confidentiality in a civil case. In *Perlman,* the documents were delivered under seal to the Clerk of the District Court for the Southern District of New York. Here, the documents were delivered to the Antitrust Division pursuant to the visitation and protective provisions of the *Paramount* decree. In each case, the same documents were sought in the lower court over the objection of petitioner. In *Perlman,* as here, it was unlikely that the person in possession of the confidential documents would risk a contempt citation to facilitate an immediate review of the order appealed from.

Indeed, it is extremely unlikely and unthinkable that the Antitrust Division would decline to make available the documents in its possession to the very same grand jury it had empanelled to investigate the same charge it had relied upon in obtaining the documents from United Artists in the first instance under the *Paramount* decree. On the contrary, instead of facilitating a decision on United Artists' application, the Antitrust Division has opposed it.

The same reasons which prompted this Court to hear the appeal in *Perlman* in advance of any contempt citation apply, *a fortiori,* to this case and the Circuit Court patently erred in its application of this Court's precedents by applying *Cobbledick* instead of *Perlman.*

As an indication of its misunderstanding, the Circuit Court's decision actually inverted this Court's statement that the finality requirement must be given a "practical rather than a technical construction," *Cohen* v. *Beneficial*

Loan Corp., 337 U.S. 541 (1948), a maxim which *Cohen* and its progeny use to find finality and permit an appeal, not, as used here, to defeat appealability.

Thus, on its face, the decision of the Circuit Court obviously conflicts with this Court's authorities dealing with the finality of orders within the context of a consent decree. This is a particularly serious conflict because of an increasing trend by the Circuit Courts to mis-apply this Court's decisions dealing with finality when grand juries are involved (discussed below). It must not be permitted to stand.

2. The Circuit Court's decision continues the much-criticized trend of the circuit courts to mis-apply this Court's opinion in *Cobbledick* v. *United States*. In doing so, the circuit courts create a hard and fast rule, not intended by this Court, against the appealability of any proceeding which is connected with a grand jury. The rule will lead, as in this case, to waste of time, expense and effort on the part of the litigants and the judiciary.

The decision of the Circuit Court cites this Court's opinion in *Cobbledick* v. *United States*, 309 U.S. 323 (1940) as primary authority for its dismissal of the appeal. In its most recent issue, the Harvard Law Review criticized the mechanical application of *Cobbledick* by the Circuit Courts to defeat the appealability of any proceeding connected *in any way* with a grand jury, even if fundamental rights are thereby lost and even if it would be more economical to allow appellate review before the grand jury has proceeded. *Note, Appealability of Orders Relating to Ongoing*

Grand Jury Proceedings: In re April 1977 Grand Jury Subpoenas (General Motors Corp. v. *United States)*, 92 Harv. L. Rev. 920 (1979).

As the author of the *Note* stated:

> "In deference to the policies disfavoring appellate interruption of the grand jury process articulated in *Cobbledick* v. *United States*, federal courts have rarely allowed appeals from orders issued by district courts relating to ongoing grand jury proceedings, construing strictly the finality requirement for appeals as of right under 28 U.S.C. §1291. *This approach*, while attentive to problems of delay and disruption that a right of appeal might create, *can lead to hardship where later review is ineffective and to substantial waste of resources where orders are later overruled and prior proceedings thereby invalidated.*" 92 Harv. L. Rev. at 920 (emphasis added) (footnotes omitted).

Although the *Note* goes on to discuss 28 U.S.C. §1292(b), the point made is equally applicable here.

There are important *and* separable rights at issue here: United Artists' right to have the Government proceed with any criminal contempt charges in the *Paramount* decree proceeding itself (where the Government has been proceeding for almost two years) pursuant to Fed. R. Crim. P. 42, rather than continuing, without prior warning, with a grand jury proceeding. As the *Note* points out, under the circuit courts' decisions denying appealability, judicial review of this right is obtainable only by standing in contempt of the grand jury subpoena or waiting until the grand jury proceeding has resulted in an indictment, trial and a final disposition on the merits.

As the *Note* correctly observes, the first alternative, requiring the party to put itself in contempt, is unreasonable, particularly where, as here, the assertion of the right does not represent a challenge to the grand jury subpoena power, but invloves a claimed misuse of the grand jury. 92 Harv. L. Rev. 931-932.

The second alternative, requiring the party to wait until the ultimate disposition on the merits after trial, may cause the irretrievable loss of fundamental rights. If United Artists is improperly indicted due to a misuse of grand jury powers, no appellate court has the power, by its later decision, to wipe away the resulting notoriety and devastating publicity. It may also result in an irretrievable waste of time, expense and effort on the part of the judiciary, as well as the litigants, when the entire grand jury proceeding and all subsequent proceedings are later overturned because they were defective from the outset. As the *Note* says:

> "Review of the disqualification issue through a motion to dismiss an indictment may unduly prejudice a party like GM. If a court overruled the earlier determination, it would have to dismiss the indictment and nullify what, given the parties involved, were probably expensive and time-consuming proceedings. Consequently, the court may be reluctant to take such action. Such reluctance would undoubtedly increase as the value of resources expended rises, and could be quite pronounced by the time appellate review is obtained by challenging a conviction." 92 Harv. L. Rev. at 937 (footnotes omitted).

This could well occur here if the appealability of the District Court's order is not recognized.

The *Note's* analysis of the Seventh Circuit's decision in the *General Motors* case is equally applicable to the Second Circuit's decision in this case:

> "After making the issue of appealability determinative, however, the court failed to analyze it thoroughly. Judge Merritt's discussion of section 1291 placed excessive reliance on *Cobbledick*'s disfavor of appellate interruption of the grand jury and did not consider satisfactorily the 'collateral order' doctrine of *Cohen* v. *Beneficial Industrial Loan Corp. Cohen* established that jurisdiction for appeal exists under section 1291 when rulings by lower courts, although not final judgments, conclusively determine important rights separable from the merits for which later review is ineffective . . . These rights are important and certainly separable from the merits of the investigation, and they were determined conclusively by the district court's denial of the disqualification motion." 92 Harv. L. Rev. at 935-936 (footnotes omitted).

The instant case presents a situation where the District Court's decree is final in both a technical and a practical sense. The rights asserted by petitioner are separate enough to be the subject of appellate review before the grand jury proceeds. In this situation, a finding of finality and appealability would promote efficiency and the preservation of rights which would otherwise be lost; the denial of appealability would lead to great waste.

Accordingly, this case presents the Court with an important opportunity to offer guidance to the lower Federal courts in the application of the *Cobbledick* rule. That rule should be clarified so as to promote justice and economy and to avoid an inflexible application of the rule to any proceeding touching a grand jury, however peripherally.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: New York, New York
May 25, 1979

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March, one thousand nine hundred and seventy-nine.

Present:

HONORABLE IRVING R. KAUFMAN, *Chief Judge.*
HONORABLE MURRAY I. GURFEIN, *Circuit Judge.*
HONORABLE JACOB MISHLER, *District Judge, sitting by designation.*

79-6033

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOEW'S INCORPORATED, et al.,
Defendants.

UNITED ARTISTS CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the order of said District Court be and it hereby is dismissed. Judge Palmieri's order was not a "final decision" within the meaning of 28 U.S.C. §1291.

1. "[O]ne to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States* v. *Ryan*, 402 U.S. 530, 532 (1971), citing *Cobbledick* v. *United States*, 309 U.S. 323 (1940).

2. The logic of *Cobbledick*—to prevent "an intolerable delay fatal to the vindication of the criminal law," 309 U.S. at 327—also bars appeal of the denial of a motion to restrain the scope of a grand jury investigation. *In the Matter of Doe*, 546 F.2d 498, 501 (2d Cir. 1976); *In Re Grand Jury Investigation of Violations*, 318 F.2d 533 (2d Cir.), *cert. dismissed*, 375 U.S. 802 (1963).

3. For the same reason, Judge Palmieri's order does not fit within the "small class" of collateral orders that may be reviewed immediately because they determine rights separable from the main action and are not "steps towards final judgment in which they will merge." *Cohen, supra*, 337 U.S. at 546. Under *Coopers & Lybrand Co.* v. *Livesay*, 98 S. Ct. 2454, 2458 (1978), this doctrine applies only where the order would be "effectively unreviewable on appeal from a final judgment." Clearly Judge Palmieri's order can be effectively reviewed after final judgment. *In the Matter of Doe, supra; In Re Grand Jury Investigation, supra.*

4. It is immaterial that Judge Palmieri's order was rendered after entry of final judgment in the *Paramount* case, or that it was the only matter pending in that case. The finality requirement must be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). In practical terms, Judge Palmieri's order was clearly not "self-contained" but rather "ancillary to [a] judicial proceeding" —the grand jury investigation—"which would be halted" were appeal permitted. *Cobbledick, supra*, 309 U.S. at 327, 330. *See Dibella* v. *United States*, 369 U.S. 122, 132 (1962) (suppression order held interlocutory even though rendered in a district other than the one in which the trial would be held).

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN
Chief Judge

/s/ MURRAY I. GURFEIN

MURRAY I. GURFEIN
Circuit Judge

/s/ JACOB MISHLER

JACOB MISHLER
District Judge